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In The

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

versus

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether a petition for a writ of habeas corpus asserting a claim of error under *Cage v. Louisiana*, 498 U.S. 39 (1990), relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. § 2244(b)(2)(A) [the Anti-Terrorism and Effective Death Penalty Act].

II.

Whether the new rule of constitutional law announced by this Court in *Cage v. Louisiana*, 498 U.S. 39 (1990) should be made retroactively applicable to petitioners seeking collateral review of their convictions.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Melvin Tyler
2. Burl Cain, Warden
3. The State of Louisiana

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit being reviewed by this Court, *Tyler v. Cain*, #98-31159 (June 1, 2000), is not reported. It is found in the Joint Appendix at pages 14-15. The "Memorandum and Order" of the United States District Court for the Eastern District of Louisiana, which denied Tyler's petition for habeas relief pursuant to 28 U.S.C. § 2254 is also unreported. This "Memorandum and Order" is found in the Joint Appendix at pages 4-13.

JURISDICTION

The United States District Court for the Eastern District of Louisiana had jurisdiction over petitioner's successive application for a writ of habeas corpus under 28 U.S.C. § 1241, an order of the United States Court of Appeals for the Fifth Circuit authorizing the filing of the application under 28 U.S.C. § 1244(a)(3) having been issued on April 29, 1997. The Court of Appeals had jurisdiction over petitioner's appeal from the denial of the application for habeas corpus under 28 U.S.C. §§ 1291 and 2253. A certificate of appealability under 28 U.S.C. § 2253(c) was issued on October 23, 1998. The Fifth Circuit issued its opinion in the case on June 1, 2000, and petitioner timely filed a petition for a writ of certiorari on August 28, 2000, which was granted on December 11, 2000. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Title 28, United States Code, Section 2244 provides, in pertinent part:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; . . .

STATEMENT OF THE CASE

On March 20, 1975, Melvin Tyler got into a fight with his girlfriend over whether she would reconcile with her husband. After drinking himself into a rage, he went to her house, stood in the alleyway outside the house, and fired a .22 caliber pistol into a draped and enclosed

window. Unbeknownst to him, Tyler's twenty-day-old daughter lay asleep under the window. Tyler's shots ricocheted, hitting the infant, causing her death. Tyler was arrested, prosecuted, and convicted of second-degree murder in the Criminal District Court for the Parish of Orleans, State of Louisiana. See *State v. Tyler*, 363 So.2d 902 (La.1978).

At Tyler's trial, the following definition of reasonable doubt was given:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused.
>
> This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. If, after giving a fair and impartial consideration of all the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable

> doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt for which you could give good reason.

After his conviction and sentence of life imprisonment were affirmed by the Louisiana Supreme Court, Tyler began seeking post-conviction relief, in both state and federal court. Included in these efforts were five petitions for post-conviction relief in the Louisiana state courts, and one petition in federal court. *See State ex rel. Tyler v. Maggio*, 428 So.2d 483 (La.1982); *State v. Tyler*, 430 So.2d 92 (La.1983); *State ex rel. Tyler v. State*, 437 So.2d 1142 (La.1983); *State v. Tyler*, 446 So.2d 1226 (La.1984); *State ex rel. Tyler v. Blackburn*, 494 So.2d 1171 (La.1986); and *Tyler v. Butler*, #88cv4929, (E.D.La.), *aff'd, Tyler v. Butler*, #90-3275 (5th Cir.1990).

In November 1990, this Court handed down its decision in *Cage v. Louisiana*, 498 U.S. 39 (1990). Because the jury instruction defining reasonable doubt given at Tyler's trial was virtually identical to the instruction condemned in *Cage*,[1] in 1995 Tyler filed his sixth petition for

[1] Like the instruction condemned in *Cage*, Tyler's jury instruction contained the following phrases: "*It must be such a doubt as would give rise to a grave uncertainty* raised in your minds by reasons of the unsatisfactory character of the evidence; one that would make you feel that you had not *an abiding conviction to a moral certainty of the defendant's guilt. * * * It should be an actual or substantial doubt.*" (Emphasis added.)

post-conviction relief in the state district court, raising *inter alia* a claim that his jury had been given an erroneous instruction regarding reasonable doubt. Tyler had not previously raised this claim.

This petition was denied by the state district court, and then by the Louisiana Supreme Court, in December 1996. *State ex rel. Tyler v. Cain*, 684 So.2d 950 (1996).

Having exhausted his state remedies, Tyler turned to federal court. In early 1997, Tyler filed a petition in the United States Court of Appeals for the Fifth Circuit for authorization to file a successive petition for federal habeas relief under 28 U.S.C. § 2254.[2]

In April 1997, the Court of Appeals granted Tyler leave to file the successive application, but limited the successive application to "whether *Cage v. Louisiana*, 498 U.S. 39 (1990) should be applied retroactively on collateral review and whether the jury instruction on reasonable doubt given to his jury was unconstitutional under *Cage* and *Victor v. Nebraska*, 511 U.S. 1 (1994). . . . " (Joint Appendix, p.3).

Thereafter, Tyler presented his *Cage* claim to the district court. In its order dated September 10, 1998, (Joint

[2] The Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(b)(3)(A), provides as follows:

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Appendix, pp.4-13) the district court held that *Cage* must be applied retroactively, because of the *en banc* opinion of the United States Court of Appeals for the Fifth Circuit in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.1998). (Memorandum and Order, Joint Appendix, pp.7-8).

However, the district court denied Tyler relief. In the view of the district court, the Anti-Terrorism and Effective Death Penalty Act (AEDPA), specifically 28 U.S.C. § 2254(d)(1), changed the standard of review for state habeas petitioners, and under the new standard of review, a "*Cage*-type" instruction like the one given at Tyler's trial was in fact acceptable. (Memorandum and Order, Joint Appendix, pp.11-12).

Tyler timely appealed the judgment of the district court to the Court of Appeals for the Fifth Circuit.

The Court of Appeals did not reach the substantive issues presented by Tyler's appeal, but instead concluded that

> [t]he district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A). Procedurally, this case is governed by *Brown v. Lensing*, 171 F.3d 1031 (5th Cir.1999), which relies on *In re Smith*, 142 F.3d 832 (5th Cir.1998). Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the *Cage* decision retroactively applicable to cases on collateral review, as AEDPA now requires. Moreover, the *Brown* case specifically disapproved the district court's approach in this case. *Brown*, 171 F.3d at 1032 n.9.
>
> Like cases demand like treatment. Tyler's successive petition fails according to *Brown* and § 2244(b)(2)(A).

(Joint Appendix, p.15).

In substance, what the Fifth Circuit held was that Tyler could not obtain relief under *Cage* in a successive habeas petition, even though the Fifth Circuit itself, sitting *en banc* in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.1998), had held *Cage* retroactively applicable to habeas corpus petitions. Following its rulings in *Smith* and *Brown*, the court ruled that under 28 U.S.C. § 2244(b)(2)(A), it was not enough that the Fifth Circuit (and every other court of appeals to address the issue) had decided that the principles laid down by this Court required that *Cage* be given retroactive effect. In the Fifth Circuit's view, the requirement in § 2244(b)(2)(A) that a successive habeas applicant present a claim that "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," could be satisfied only if this Court itself directly held that *Cage* was retroactive.

Tyler's petition for a writ of certiorari to the Fifth Circuit followed.

SUMMARY OF THE ARGUMENT

Under the AEDPA, a habeas petitioner may obtain relief in a successive petition if, but only if, he or she satisfies the requirements of 28 U.S.C. § 2244(b)(2). That subsection requires dismissal of a successive petition unless the petitioner establishes that he or she is legitimately entitled to rely on either newly established rules of law or newly discovered facts warranting relief. As to newly established law, the statute provides that the successive habeas applicant must show that his claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

The AEDPA neither defines the term "new rule of constitutional law" nor provides standards for determining when a "new rule" applies retroactively. This statutory silence, viewed against the backdrop of this Court's habeas corpus jurisprudence, indicates an intent to incorporate this Court's body of cases concerning the definition of new rules and the circumstances under which they are retroactively applicable in habeas proceedings.

The underlying principles of retroactivity are, of course, set forth in this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, a "new rule" of criminal procedure is one not compelled or dictated by precedent at the time of its announcement by this Court. Such new rules are retroactively applicable only if they either place substantive conduct beyond the reach of criminal punishment or announce "watershed rules" that are essential to the fairness and reliability of criminal proceedings. When a new rule within the meaning of *Teague*

has been "made retroactive" by the Court under the criteria set forth in *Teague*, a successive habeas petition invoking that rule is not subject to dismissal under § 2244(b)(2)(A).

Here, the rule that petitioner Tyler sought to invoke in his successive habeas application is the holding of *Cage v. Louisiana*, 498 U.S. 39 (1990), which condemned the reasonable-doubt instruction given to the jury in Tyler's case. There is no doubt that, from Tyler's standpoint, *Cage* announced a "new rule" under *Teague*, for it postdates the affirmance of his conviction on direct appeal, and it was not dictated by precedent in existence at the time his conviction became final.

Nonetheless, the Fifth Circuit held that Tyler's petition was subject to dismissal under § 2244(b)(2)(A) – not because the *Cage* rule *is not* retroactive (indeed, the Fifth Circuit agrees with the other courts of appeals that it *is* retroactive), but because, in the Fifth Circuit's view, the *Cage* rule has not yet been *"made"* retroactive *by this Court*.

In so holding, the Fifth Circuit has given § 2244(b)(2)(A) a constricted meaning that is not justified by its language. The statute does not require a direct *holding* by this Court that a particular rule is retroactive, but only action by this Court that has the effect of "making" it retroactive. Where precedents of this Court compel the conclusion that a particular new rule must be retroactive, that standard is satisfied.

That is the situation in this case. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that *Cage* error is a "structural error" that is so fundamental to the fairness

and accuracy of a criminal proceeding that it can never be harmless error. The reasoning of the Court in *Sullivan* demonstrates without doubt that *Cage* must also be retroactively applicable in habeas proceedings, for the test for "structural error" is substantively identical to the one used to identify "watershed rules" under *Teague*. *Sullivan* held that *Cage* error necessarily vitiates a conviction, and the reasoning that leads to that result also dictates retroactivity. Indeed, the conclusion is so evident that every court of appeals to consider the issue after *Sullivan* has agreed.

Thus, in a very real sense, this Court *has* "made" *Cage* retroactive. The Court of Appeals' ruling, which is premised solely on the view that *Cage* has not been made retroactive, must therefore be reversed.

Alternatively, even if this Court has not yet "made" *Cage* retroactive within the meaning of § 2244(b)(2)(A), the reasoning of *Sullivan* plainly indicates that it should now do so explicitly. Once the Court takes that step, *Cage* will without question have been "made" retroactive by this Court, and Tyler's successive petition will be proper under § 2244(b)(2)(A). Thus, even if the Court agrees with the Fifth Circuit's construction of § 2244(b)(2)(A), reversal of the decision below will still be required once this Court resolves the question of *Cage*'s retroactivity.

ARGUMENT

I.

A HABEAS PETITIONER WHO CLAIMS *CAGE* ERROR RELIES ON A "NEW RULE OF CONSTITUTIONAL LAW, MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT"

A. *Cage* Announced a "New Rule"

There is no question but that *Cage v. Louisiana* announced a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and the AEDPA. As *Teague* makes clear, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government" – that is, when "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. This definition of a new rule has been repeatedly reaffirmed by the Court. *See O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *Graham v. Collins*, 506 U.S. 461, 466-467 (1993). As the Court put it in *Goeke v. Branch*, 514 U.S. 115 (1995), the question is "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Id.* at 118 (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)). If an issue was "susceptible to debate among reasonable minds," the resolution of the issue constitutes a new rule. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

Although the rule of *Cage* was based upon and was consistent with existing precedent, it was not *dictated* by precedent, and was hardly beyond debate by reasonable jurists. While the theoretical foundations for *Cage* were

laid by *In re Winship*, 397 U.S. 358 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979), those cases did not by themselves compel the outcome of *Cage* before it was decided, and certainly could not have been viewed as dictating the result at the time Tyler's conviction was affirmed in 1978.[3] As the Fourth Circuit has stated, "Whether a trial

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[3] The Louisiana Supreme Court's treatment of the issue over the years demonstrates that the issue was, at best, uncertain until *Cage* was decided. That court upheld a similar instruction against federal constitutional challenge in 1968, *see State v. Schoonover*, 211 So.2d 273 (La.1968), and after a brief detour in which the court struck down such an instruction in 1982, *see State v. McDaniel*, 410 So.2d 754 (La.1982), the court reverted to upholding such instructions, *see State v. Taylor*, 410 So.2d 224 (La.1982); *State v. Messiah*, 538 So.2d 175 (La.1988). In 1989, the court relied upon *Taylor* and *Messiah* to uphold the jury instruction given at Tommy Cage's trial. *See State v. Cage*, 554 So.2d 39, 41 (La.1989). This, of course, is the decision that ultimately led to this Court's decision in *Cage v. Louisiana* the following year. Remarkably, even after *Cage*, the Louisiana Supreme Court seems to consider the issue an open one. As the court most recently noted in *State v. Penns*, 758 So.2d 776, 777-778 (La.1999):

> In *State v. Smith*, 637 So.2d 398, 406, *cert. denied*, 513 U.S. 1045 (1994), this court held that in light of *Victor v. Nebraska*, 511 U.S. 1 (1994), a so-called *Cage* instruction, *see Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*), did not require reversal of the defendant's conviction on grounds that it diluted the state's burden of proving the accused's guilt beyond a reasonable doubt in violation of due process guarantees. * * * Unless and until the United States Supreme Court resolves the status of a *Cage/Humphrey* instruction after *Victor*, our decisions in *Smith* and [*State v.*] *Williams* [708 So.2d 703 (1998)], as well as our decision in *State ex rel. Taylor v. Whitley*, 606 So.2d 1292 (La.1992) (*Cage* not retroactively applicable to

court's unconstitutional misdescription of the burden of proof in a criminal case violates the Due Process Clause was certainly an open question before *Cage*." *Adams v. Aiken*, 41 F.3d 175 (4th Cir.1994).

This conclusion is shared by every court that has considered the question. *Tillman v. Cook*, 215 F.3d 1116, 1122 (10th Cir.2000); *Gaines v. Kelly*, 202 F.3d 598, 602-03 (2d Cir.2000); *West v. Vaughn*, 204 F.3d 53 (3d Cir.2000); *Rodriguez v. Superintendent, Bay State Correctional Center* 139 F.3d 270, 273-74 (1st Cir.1998); *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.) (*en banc*), *cert. denied*, 525 U.S. 935 (1998); *In re Hill*, 113 F.3d 181 (11th Cir.1997); *Nevius v. Sumner*, 103 F.3d 453 (9th Cir.1996); and *Nutter v. White*, 39 F.3d 1154 (11th Cir.1994). The Fifth Circuit summed the matter up in *In re Smith*, 142 F.3d 832, 835 (5th Cir.1998): "It is undisputed that *Cage* announced a new rule of constitutional law."

B. Section 2244(b)(2)(A) Does Not Require that a New Rule Be "Made Retroactive" by a Direct Holding of this Court

Cage, as a new rule of constitutional law announced by this Court, may serve as the basis for entertaining and granting a successive habeas petition under 28 U.S.C. § 2244(b)(2)(A) if it has been "made retroactive to cases

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> final convictions subject only to collateral attack), and not the decision in *Humphrey* [*v. Cain*, 138 F.3d 552 (5th Cir.1998) (*en banc*), *cert. denied*, 525 U.S. 935 (1998)], bind the district courts of this state in reviewing claims that trial judges have read erroneous instructions on reasonable doubt.

on collateral review by the Supreme Court." The premise of the Fifth Circuit's decision in this case is that the plain meaning of this language permits the filing of a successive petition *only* when there has been a decision of this Court that *directly holds* a new rule retroactive on collateral review – either by explicitly stating that the rule applies retroactively in such proceedings, or by specifically applying the rule in a habeas case. *See In re Smith*, 142 F.3d at 835.

In the view of the Fifth Circuit, absent such a direct holding by this Court, the lower federal courts may not apply the new rule retroactively in a successive habeas petition – even though the Fifth Circuit itself (along with every other federal court of appeals that has reached the issue) has held that the principles of this Court's decisions compel the conclusion that the new rule announced in *Cage does* apply retroactively in habeas proceedings.[4]

The Fifth Circuit's reading of the statute is not, however, commanded by the law's plain language.[5] Moreover, its reading carries with it bizarre consequences for the administration of justice under the habeas corpus statute. The statute is equally susceptible of a reading that avoids

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[4] The result is that in the Fifth Circuit, a state prisoner whose conviction was affirmed before *Cage* is entitled to have *Cage* retroactively applied in an *initial* habeas petition, but not in a *successive* habeas petition.

[5] Reliance on "plain meaning" is hazardous when dealing with the portions of the habeas statute added by the AEDPA, the language of which is often complex and confusing. As this Court has recognized, "in a world of silk purses and pig's ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

those consequences; a reading that does not necessitate a direct holding by this Court to make a claim retroactively available in a successive habeas petition when retroactivity is the unmistakable import of this Court's rulings. The particular language at issue here – "made retroactive to cases on collateral review by the Supreme Court" – does not yield only a single, unambiguous meaning. Indeed, the meaning ascribed to it by the Fifth Circuit (and other courts that have given it the same reading) is not even its most natural reading.

The statute does not require that a new rule have been "held" retroactive by the Supreme Court, or "applied retroactively" by the Supreme Court – words that would have made it clear that a direct action by the Supreme Court was necessary before a new rule could be relied on in a successive petition. *Cf. Williams v. Taylor*, 120 S. Ct. 1479, 1488 (2000) (*Williams I*).[6] Instead, the statute says only that the rule must be "made retroactive to cases on collateral review by the Supreme Court." As the Third Circuit has recently pointed out, the "many meanings" of "the broader verb 'made' " include "to have 'caused to occur' and 'caused to be or become: put in a certain state or condition.' " *West v. Vaughn*, 204 F.3d 53,

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[6] In *Williams I*, the Court rejected the argument that the use of the term "failed to" in the AEDPA (28 U.S.C. § 2254(e)(2)) was intended to mean simply "did not," with no implication of fault. The Court stated: "Had Congress intended a no-fault standard, it would have had no difficulty making its intent plain. It would have had to do no more than use, in lieu of the phrase 'has failed to,' the phrase 'did not.' " 120 S. Ct. at 1488.

59 (2000) (quoting *Webster's Third New International Dictionary* 1363 (1966)). Similarly, the *Oxford American Dictionary* (1980) includes among sixteen listed definitions of the verb to "make" the following: "to establish (laws or rules or distinctions)," "to cause to exist, to produce," "to result in," and "to cause to be or become."[7] Moreover, the word does not exclude "making" something happen indirectly as well as directly.

Notably, where the drafters of the AEDPA intended to require that something be done directly by a specific court, they made that intention plain. For example, one of the triggers for the new one-year statute of limitations for the filing of a habeas petition is "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C). This formulation makes clear that it is the Supreme Court itself that must "initially recognize" and "newly recognize" a right to start the running of the statute of limitations, as distinct from the less specific requirement that the right be "made retroactively applicable." Similarly, § 2244(c) makes judgments of this Court conclusive on issues of fact or law "actually adjudicated by the Supreme Court." And § 2254(d)(1) provides that only "clearly established Federal law, as determined by the Supreme Court of the United States," may serve as the basis for habeas relief, making clear that "this Court's

[7] *Cf. Williams I*, 120 S. Ct. at 1488 (noting multiple dictionary definitions of "fail").

jurisprudence" is the exclusive source of clearly established law. *Williams v. Taylor* (*Williams II*), 120 S. Ct. 1495, 1523 (2000).

Under § 2244(b)(3), which requires "authorization" by a court of appeals before any successive petition is filed, the drafters of the statute went out of their way to make clear that such "authorization" by the court of appeals must be direct and express, by requiring the petitioner to file a motion in the court of appeals and requiring the court of appeals to "grant or deny the authorization" within 30 days of the filing of the motion. With equal specificity, 28 U.S.C. § 2255 provides for appointment of counsel "except as provided by a rule *promulgated by* the Supreme Court" (emphasis added).

In all these instances, the statutory language makes unmistakably plain that a particular court must do something actively, directly, and expressly. By contrast, the language of § 2244(b)(2)(A) requires only that this Court must have done (or do) something that has the effect of "making" a new rule retroactive in collateral proceedings. Of course, this language "obviously encompasses direct retroactive application of a rule by the Supreme Court or express statements to that effect," but those meanings do not "exhaust the phrase." *West v. Vaughn*, 204 F.3d at 59. As the Third Circuit has recognized, the language raises the question "whether there are alternative methods through which the Supreme Court could cause a rule to become retroactive." *Id.* The answer is definitely yes.

An example makes the point. In *Bousley v. United States*, 523 U.S. 614, 621 (1998), this Court held that the *Teague* rule of nonretroactivity does not apply to new

decisions that "hol[d] that a substantive federal criminal statute does not reach certain conduct." *Id.* at 620. Rather, after *Bousley*, such decisions are *automatically* retroactive in cases on collateral review. *See id.* It was, of course, necessary for the Court to decide *Bousley* in order to resolve a conflict among the Circuits over the retroactivity of the Court's decision in *Bailey v. United States*, 516 U.S 137 (1995).

After *Bousley*, however, retroactivity is no longer an open issue when the Court decides such cases as *Jones v. United States*, 120 S. Ct. 1904 (2000) (limiting scope of 18 U.S.C. § 844(i)), or *Cleveland v. United States*, 121 S. Ct. 365 (2000) (holding that licenses are not "property" under mail and wire fraud statutes). There can be no doubt that, in light of *Bousley*, this Court "makes" such rulings retroactive in cases on collateral review merely by issuing them: their retroactivity goes without saying. But under the Fifth Circuit's construction of "made retroactive to cases on collateral review by the Supreme Court," that is not good enough. Unless this Court were to go through the pointless exercise of taking a case merely to establish what any reasonable jurist would already know was the law, successive petitions seeking the retroactive application of such new rulings would be barred, even though it must be apparent to everyone that the rulings have in fact been "made retroactive."[8]

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[8] This particular consequence might not often arise for petitions filed under 28 U.S.C. § 2254, to which § 2244(b)(2)(A) is applicable, because this Court does not define the substantive scope of state criminal statutes. But the *Bousley* principle of automatic retroactivity also applies to decisions holding that certain conduct (for example, flag-burning) may not constitutionally be criminalized. *See Bousley*, 523 U.S. at 620. Such rulings, of course, are applicable to state statutes and may be invoked by state prisoners through petitions under § 2254. Moreover, 28 U.S.C. § 2255, the avenue through which federal prisoners seeking the retroactive application of this Court's rules of substantive federal criminal law must obtain relief, contains precisely the same requirement that successive motions not based on newly discovered evidence must invoke "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The Fifth Circuit's interpretation of "made retroactive" would thus potentially choke off access to the court for both state and federal prisoners in cases involving rules that, under *Bousley*, are necessarily retroactive.

As this example illustrates, the most vexing consequence of the Fifth Circuit's construction of the statute is that it creates an absurd dilemma: either this Court must take up and decide retroactivity issues that are so obvious that they do not meet the ordinary standards for the exercise of this Court's certiorari jurisdiction, or prisoners will be denied the right to file successive habeas petitions in precisely the circumstances where such petitions are most clearly justified – that is, when this Court has issued a new rule that all would agree is entitled to retroactive effect on collateral review. The statute itself reflects a recognition that a prisoner *should* be permitted to obtain habeas relief through a successive petition when this Court has established a new rule of constitutional law that was not previously available to the prisoner and that is retroactive in habeas proceedings. If, however, this Court must explicitly decide the retroactivity question before a new rule becomes available to successive habeas petitioners, the perverse consequence will be that *the more obvious it is that a rule should be retroactive, the less likely it*

is that a successive petitioner will be able to avail himself of it – for this Court generally will issue a writ of certiorari only to decide a doubtful issue that has divided the lower courts, not one whose resolution is so easy that it has led to unanimity below.

This case provides a striking illustration. Seven of the twelve regional Circuits have addressed the issue of *Cage*'s retroactivity. All seven have held that this Court's ruling in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), although not addressing retroactivity directly, compels the conclusion that *Cage* must be given retroactive effect. *See Gaines v. Kelly*, 202 F.3d 598, 602-03 (2d Cir.2000); *West v. Vaughn*, 204 F.3d 53 (3d Cir.2000); *Adams v. Aiken*, 41 F.3d 175 (4th Cir.1994); *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.) (*en banc*), *cert. denied*, 525 U.S. 935 (1998); *Harmon v. Marshall*, 69 F.3d 963 (9th Cir.1995); *Tillman v. Cook*, 215 F.3d 1116, 1122 (10th Cir.2000); *Nutter v. White*, 39 F.3d 1154 (11th Cir.1994). Such uniformity among the lower courts ordinarily would "obviat[e] the need for the Supreme Court to make a future, more explicit pronouncement on whether *Cage* should be applied retroactively." *West v. Vaughn*, 204 F.3d at 62. Under the Fifth Circuit's view of § 2244(b)(2)(A), the very unanimity among the courts of appeals that *Cage* must be retroactive would effectively bar petitioners such as Tyler from raising it.

Of course, this Court has now granted certiorari in this case in part to resolve the question whether *Cage* should be given retroactive effect. But absent the direct conflict among the courts of appeals over the construction of § 2244(b)(2)(A) created by the Third Circuit's decision in *West v. Vaughn*, there is strong reason to doubt

whether this Court would have considered it worthwhile to address the retroactivity question on which all the lower courts have agreed, and successive habeas petitioners in the Fifth Circuit (and other circuits that have adopted a similar construction of § 2244(b)(2)(A)) would simply be out of luck.[9] Unless this Court imposes upon itself the burden of deciding retroactivity issues that do not satisfy the normal standards for review by this Court, adoption of the Fifth Circuit's construction of § 2244(b)(2)(A) will leave future habeas petitioners in the same predicament, in which the easier the retroactivity issue is, the harder it is to obtain relief.

It is axiomatic that, where it is possible, a statute should be read to avoid results that are absurd, unreasonable, and contrary to the underlying purpose of the law. *See American Tobacco Company v. Patterson*, 456 U.S. 63, 71 (1982). The construction of § 2244(b)(2)(A) that the Fifth Circuit has adopted leads to precisely such consequences. To avoid them, the Court should adopt a more plausible and natural reading of the statute, under which a new decision of this Court establishing a constitutional right is "made retroactive" by this Court when the principles of

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[9] In 1999, for example, before the decision in *West v. Vaughn* made the conflict over § 2244(b)(2)(A) inescapable, this Court (with three Justices dissenting) declined to give plenary consideration to an application for an original writ of habeas corpus raising the *Cage* retroactivity issue in *In re Smith*, 119 S. Ct. 2064 (1999), despite the Solicitor General's urging that the case be set for briefing and argument. The result was that the Fifth Circuit's decision denying Mr. Smith leave to file a successive application seeking retroactive relief under *Cage* was allowed to stand. *See In re Smith*, 142 F.3d at 842.

this Court's decisions compel the conclusion that it must be retroactive. Given the narrowness of the exceptions to the retroactivity rules of *Teague*, such cases will doubtless be rare, but they will be precisely the cases in which allowing habeas corpus relief is necessary to vindicate fundamental principles and avoid unjust results. As demonstrated below, cases involving claims of *Cage* error fall into that category.

C. The Rule in *Cage* Has Been "Made Retroactive" to Cases on Collateral Review by this Court

Under *Teague*, the new rule of constitutional law announced by the Court in *Cage* is retroactively applicable to cases on collateral review if it falls within one of two "narrow exceptions" to *Teague*'s general nonretroactivity principle. The first exception, inapplicable here, is for rules that "plac[e] 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe.' " *Teague*, 489 U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (opinion of Harlan, J.)). The second exception applies to "watershed rules of criminal procedure" that "implicate the fundamental fairness of the trial" and are "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 311, 312, 313. This Court's decision in *Sullivan v. Louisiana*, 508 U.S. 276 (1993), compels the conclusion that the *Cage* rule falls squarely within the second exception.

In *Teague*, the Court expressly adopted Justice Harlan's view of retroactivity for cases on collateral review, as set forth in his opinion in *Mackey v. United States*, 401

U.S. 667, 675 (1971) – including Justice Harlan's view that there were but two exceptions to the rule. *Teague*, 489 U.S. at 311-12. *Teague* elaborated on the nature of the second exception, which in Justice Harlan's formulation applied to new rules requiring the observance of " 'those procedures that . . . are "implicit in the concept of ordered liberty." ' " *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693). According to the *Teague* Court, Justice Harlan's language left "no doubt" that this second exception was "to be reserved for watershed rules of criminal procedure." *Id.*

Teague went on to emphasize that the "watershed rules" exception was limited to new rules that combined two essential characteristics, both derived from Justice Harlan's opinions on retroactivity. *See Teague*, 489 U.S. at 312. First, a rule falling within the second exception must be "central to an accurate determination of innocence or guilt" – that is, it must establish "procedures without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313. Second, "the procedure at issue must implicate the fundamental fairness of the trial." *Id.* at 312. In Justice Harlan's words, the new rule must " 'alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.' " *Id.* (quoting *Mackey*, 401 U.S. at 693-94) (emphasis in *Teague*).

Subsequent decisions of this Court have reiterated these basic elements of the second *Teague* exception. For example, in *Sawyer v. Smith*, 497 U.S. 227 (1990), the Court summarized the exception as follows: "A rule that qualifies under this exception must not only improve accuracy,

but also ' "alter our understanding of the *bedrock procedural elements*" ' essential to the fairness of a proceeding." *Id.* at 242 (citation omitted). *See also, e.g., Graham v Collins*, 506 U.S. 461, 478 (1993); *Butler v. McKellar*, 494 U.S. 407, 416 (1990).

A rule that satisfies these stringent limitations is in select company indeed. That the rule in *Cage* falls within this "small core of rules" (*Graham v. Collins*, 506 U.S. at 478), however, has already been effectively determined by this Court's holding in *Sullivan v. Louisiana* that the *Cage* rule is in the equally exclusive company of those rules that are so fundamental to the fairness of a proceeding and so essential to the accurate determination of guilt or innocence that their violation can *never* be harmless error.

In *Sullivan*, the Court held that a jury instruction identical to the one held unconstitutional in *Cage* was one of those few "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." *Sullivan*, 508 U.S., at 281 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)). The Court rested this conclusion on the role of a constitutionally adequate reasonable doubt instruction in ensuring the fundamental right to trial by jury, which "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' " *Id.* at 277. Moreover, the Court emphasized, "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt" – a verdict that cannot ever come into being when an improper reasonable-doubt instruction is given. *Id.* at 278. As the Chief Justice put it in his concurring opinion, "A constitutionally deficient

reasonable-doubt instruction will *always* result in the absence of 'beyond a reasonable doubt' jury findings." *Id.* at 285 (Rehnquist, C.J., concurring) (emphasis added). Or, to use the majority's succinct formulation, "a misdescription of the burden of proof" "vitiates *all* the jury's findings." *Id.* at 281 (emphasis in original).

From these premises, the Court reasoned that an unconstitutional reasonable doubt instruction necessarily destroys the fairness and reliability of a criminal trial. In the words of the Court:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort [structural defects], the jury guarantee being a basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose* [*v. Clark*, 478 U.S. 570], at 577 [(1986)]. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. [145], at 155 [(1968)]. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.

Id. at 281-82.

The conclusion that the *Cage* rule is "structural error" that is not amenable to harmless error review necessarily implies that the *Cage* rule falls within the second *Teague* exception, for the two tests are essentially identical. Both are designed to isolate a very small class of procedures so fundamental that this Court will not tolerate a conviction

when they have been violated.[10] And both have the same focus on identifying procedures that are simultaneously essential to the fundamental fairness of a proceeding and to the reliability of the determination of innocence or guilt. As the Court explained in *Arizona v. Fulminante*, 499 U.S. 279 (1991), which established the standard for identifying structural errors that was applied in *Sullivan*, a structural error is one that deprives the defendant of those "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 310 (quoting *Rose v. Clark*, 478 U.S. at 577-78). The twin requirements of reliability and fundamental fairness are perfectly congruent with the elements of the second *Teague* exception.

Moreover, the specific factors emphasized by the *Sullivan* Court in explaining why *Cage* errors are structural defects also point ineluctably to the conclusion that *Cage* announced a "watershed rule" within the meaning of *Teague*. First, as *Sullivan* repeatedly emphasized, *Cage* error fundamentally undermines the reliability of a trial's outcome. The *Cage* rule is designed to protect the reasonable-doubt standard, which itself "guards against conviction of the innocent by ensuring the *systematic* accuracy of the criminal system." *Nutter v. White*, 39 F.3d 1154, 1157

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[10] *Compare Teague*, 489 U.S. at 313 ("we believe it unlikely that many such components of basic due process have yet to emerge") *with Neder v. United States*, 527 U.S. 1 (1999) ("We have found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.' ")

(11th Cir.1994). The impact of an improper reasonable-doubt instruction, the *Sullivan* Court stated, was "unquantifiable," "indeterminate," and "unmeasurable," but an erroneous instruction under *Cage* deprived the defendant of rights *"without which a criminal trial cannot reliably serve its function."* *Sullivan*, 508 U.S. at 281-82 (emphasis added). Indeed, as *Sullivan* emphasized, *Cage* error not only deprives the defendant of a *reliable* determination of guilt or innocence; in a very real sense, it means that *there has been no verdict at all. Id.* at 279-81. The error thus renders it "impossible to assess the accuracy of the conviction." *Nutter*, 39 F.3d at 1157. In *Teague*'s terms, the *Cage* rule is "central to an accurate determination of innocence or guilt," 489 U.S. at 313, for when *Cage* has been violated there can be no accurate determination of innocence or guilt.

Similarly, *Sullivan* makes clear that *Cage* falls within the category of rules that "implicate the fundamental fairness of the trial." *Teague*, 489 U.S. at 312. *Sullivan*'s central point is that *Cage* error deprives a defendant of what can only be called a "bedrock element" of procedural fairness: the right to have the *jury* make the essential determination of guilt beyond a reasonable doubt. Nothing can be more evident from a reading of the opinion than that the Court regarded the protections of *Cage* as fundamental to the fairness of the proceeding. Thus, *Sullivan* makes clear that *Cage* falls within the category of opinions that, as *Teague* put it, "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 311. Lest there be any doubt on the

point, the *Sullivan* opinion echoes this passage from *Teague* when it states bluntly that *Cage* error "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281.

Thus, the reasoning of *Sullivan* necessarily makes *Cage* retroactive under *Teague*. This conclusion finds further support in the Court's action in *Adams v. Evatt*, 511 U.S. 1001 (1994). *Adams* arose from the Fourth Circuit's decision in *Adams v. Aiken*, 965 F.2d 1036 (4th Cir.1992), in which that court held, prior to *Sullivan*, that *Cage* did not apply retroactively under either the first or the second *Teague* exception. As to the second exception, the Fourth Circuit held that a *Cage* error did not affect "the *bedrock procedural elements* essential to the fairness of the proceeding." 965 F.2d 1312 (citation and internal quotation marks omitted).

This Court initially denied certiorari in *Adams*. 508 U.S. 974 (1993). Six days after the decision in *Victor v. Nebraska*, 511 U.S. 1 (1994), however, the Court granted rehearing, and, in a one-paragraph order, granted the petition for a writ of certiorari, vacated the judgment of the Court of Appeals for the Fourth Circuit, and "remanded [the case] to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Sullivan v. Louisiana*, 508 U.S. 275." Since the only claim made in the *Adams* petition for certiorari that related in any way to *Sullivan* was the claim that *Cage* should be applied retroactively, it is evident that the Court's action reflected the view that *Sullivan* had a bearing on the retroactivity issue.

On remand, the Fourth Circuit took the point immediately, and concluded that *Sullivan*'s recognition that

Cage violations constitute structural error dictated that *Cage* was to be applied retroactively. *Adams v. Aiken*, 41 F.3d 175, 178 (4th Cir.1994). As the Fourth Circuit explained:

> In view of . . . *Teague*'s second exception, the question arises whether the remedy for an unconstitutional reasonable doubt instruction should be applied retroactively. The answer is found in *Sullivan*'s explanation of the crippling effects of such an instruction: "a misdescription of the burden of proof . . . vitiates *all* the jury's findings." Without a jury's constitutional finding of guilt, a conviction lacks both "accuracy" and one of the "*bedrock procedural elements* essential to the fairness of the proceeding."

Id. at 178 (citations omitted; emphasis in original).

Every other court of appeals to face the issue has reached the same conclusion. The Fifth Circuit, which had previously held *Cage* not to be retroactive, overruled itself *en banc* after *Sullivan*, holding that "the Supreme Court *has made it plain* that *Cage-Victor* errors fit within the second *Teague* exception." *Humphrey v. Cain*, 120 F.3d 526, 529 (5th Cir.1997) (emphasis added) (panel opinion adopted by *en banc* court in *Humphrey v. Cain, supra*). As noted above, the Second, Third, Ninth, Tenth and Eleventh Circuit have also held that *Sullivan* requires retroactive application of *Cage* (*see* cases cited *supra* p. 20), and no court since *Sullivan* has disagreed. All these courts of appeals have reached the same conclusion: that *Sullivan*'s reasoning conclusively demonstrates that the *Cage* rule vindicates the values of reliability and fundamental fairness that require retroactivity under *Teague*'s second exception.

Together, *Teague*, *Cage*, *Sullivan*, this Court's action in *Adams*, and the unanimous response of the courts of appeals compel the conclusion that this Court's precedents have made *Cage* retroactive. Under any reasonable construction of the AEDPA, where this Court's decisions so clearly necessitate retroactive application of a new rule, that rule has indeed been "made retroactive to cases on collateral review by the Supreme Court."

II.

IF *CAGE* HAS NOT YET BEEN "MADE RETROACTIVE" BY THIS COURT WITHIN THE MEANING OF THE AEDPA, THIS COURT SHOULD NOW MAKE IT SO

If, contrary to our argument, a new rule can be "made retroactive" by this Court under 28 U.S.C. § 2244(b)(2)(A) *only* by a *direct* holding of this Court, this Court should proceed to make *Cage* retroactive by affirmatively answering the second question presented: "Whether the new rule of constitutional law announced by this Court in *Cage v. Louisiana*, 498 U.S. 39 (1990) should be made retroactively applicable to petitioners seeking collateral review of their convictions." As we have demonstrated, *Sullivan*'s reasoning conclusively demonstrates that the *Cage* rule falls within the second *Teague* exception. Therefore, if *Sullivan* has not already "made" *Cage* retroactive, this Court should do so now. On remand, with *Cage* having been "made retroactive by this Court," petitioner Tyler will be eligible for relief under § 2244(b)(2)(A) if he otherwise is able to establish that his

trial was indeed infected by *Cage* error, and if the other requirements of the habeas statutes are satisfied.

CONCLUSION

For the foregoing reasons, the Court should hold that its decision in *Cage v. Louisiana* is a new rule of law that has been made retroactive (or is now retroactive) to cases on collateral review. Accordingly, the Court should reverse the decision of the Court of Appeals for the Fifth Circuit in these proceedings and remand for further proceedings.

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